IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 650 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANUBHAI RAMABHAI SODHA
Versus
STATE OF GUJARAT

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Appearance :
MR YV BRAHMBHATT for MR HM PARIKH for Appellant.
MR PD BHATE, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 12/12/2007

ORAL JUDGMENT

1. Appeal arises out of judgment and order dated 16-6-1997 passed by learned Assistant Sessions Judge, Nadiad in Sessions Case No.90 of 1995.

2. The appellant was original accused. He was charged with offences punishable under Sections 376, 504 of the Indian Penal Code and Section 3 (1) (11) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act. Learned Additional Sessions Judge convicted the appellant only under Section 376 of the Indian Penal Code and sentenced him to rigorous imprisonment of seven years and imposed a fine of Rs.250/-. Regarding rest of the charges, he was acquitted.

3. As per the prosecution, the appellant committed intercourse with the victim in the night of 24th April 1995. As per the prosecution, she was less than 16 years of age on the date of the incident and even otherwise the intercourse was without her consent and against her wish.

4. To bring home the charge, prosecution examined several witnesses.

5. Prosecutrix (Let us call her "A"), P.W.1, Exh.11, stated that she and her friend Geeta had gone to the village to fill water. At about 12 O' Clock at night on the way, the accused intercepted her, pressed his hand on her mouth and took her inside of the field. Her friend Geeta was threatened with serious consequences, if she said this to anybody. Upon which Geeta went away from the place. After this, the accused removed her clothes and had intercourse with her. Thereafter, she went home crying and narrated the incident to her mother.

5.1 In her cross-examination, she denied that she did not resist the accused. She, in fact, scratched him on the head.

6. Friend of the prosecutrix, Geetaben, P.W.2, in her deposition at Exh.13 identified the accused before the Court and stated that at 12 O'

Clock at night on the date of the incident when she and the prosecutrix were going to fill the water, the accused came and dragged prosecutrix and threatened the witness. She, therefore, went home. Sometime thereafter, prosecutrix came crying to her house.

6.1 In the cross-examination, she admitted that after the prosecutrix was taken away she did not shout for help.

7. Ujamben, P.W.5 is the mother of the prosecutrix. As per her evidence recorded at Exh.25, the prosecutrix had narrated the incident to her.

7.1 In the cross-examination, she denied the suggestion that earlier she did not disclose that prosecutrix "A" is also known by the name "S". She admitted that Geeta did not tell her that prosecutrix was taken away by the accused before she came back. She admitted that she had tried to beat up her daughter but had not actually beaten her.

7.2 P.W.10, Arjunsinh, Exh.41 was the teacher in the primary school where prosecutrix had allegedly studied. He produced the School Leaving Certificate of one "S", whose date of birth was recorded as 1-5-1980. As per the prosecution, prosecutrix "A" is also known by the name "S".

8. P.W.3, Dr.Nasharbhai Desai, Exh.15 had examined the physical condition of the accused. He did not find any signs of external injuries either on the body of the accused or on his private parts. Significantly, he stated that the age of the accused was about 16 years as per the medical examination.

9. Dr.Dilipkumar Mansukhlal, P.W.4, Exh.22 was a doctor, who had examined prosecutrix. She had given him the history of sexual intercourse on the previous night. She had changed her clothes and also taken bath. Doctor did not notice any signs of external injuries on her. He did not spot presence of semen or blood around her private parts. He, however, found that there were cut marks on the libia major and edges were reddish. Her hymen was completely ruptured and its edges were also reddish in colour. The rear wall of the vagina also had a cut. The girl was finding it painful to walk. He was, therefore, of the opinion that the girl could have been subjected to intercourse in last 24 hours. Upon physical verification, the doctor had found that the girl had very sparse hair in the underarm and the private parts. He also noticed that her breast and nipples were under developed and that she had first menstruated about five months back. He had taken the x-rays of her elbow and wrist. He found that fusion of radius bone has not yet begun. He, therefore, opined that the girl was aged between 14 to 16 years of age.

9.1 In his cross-examination, he denied that the injury to the wall of the vagina could have been caused by scratching. He agreed that the age of the girl could also be 16 years. He, however, denied that a person would have 28 teeth only at the age of 18. He agreed that estimation of age given by him cannot be exact.

10. From the above evidence on record, there appears no doubt about the fact that the accused had sexual intercourse with the prosecutrix. Her own statement is sufficiently clear on this aspect. Medical evidence in form of deposition by Dr.Dilipkumar Mansukhlal, P.W.4 also corroborates this aspect. He had examined the prosecutrix shortly after the incident. He found her hymen totally ruptured. There were certain

external injuries and soreness in the vagina. He was clearly of the opinion that the prosecutrix was subjected to sexual intercourse in last 24 hours.

11. Two questions, however, arise. Firstly whether the intercourse was with the consent of the prosecutrix and whether she was above 16 years of age, so that her consent would have relevance.

12. Insofar as first question is concerned, if we assess the evidence on record, it seems that even as per the deposition of prosecutrix, P.W.1, and her friend Geeta, P.W.2, at about 12 O' Clock at night when they were going to fetch the water, accused intercepted the prosecutrix and snatch her away and took her to a field. Geeta was threatened and she left the place. After the accused had intercourse with the prosecutrix, she went to the house of Geeta and she was crying.

13. No marks of struggle, injuries or torn clothes have been detected. No injuries, however, superficial are found on the body of the prosecutrix or also on the body of the accused. Geeta's conduct also is not in consonance with the theory of forced sex with the prosecutrix. She simply left the place and went home. She did not inform anybody about the missing of the prosecutrix.

14. Significantly, the mother of the prosecutrix, P.W.5, admitted in cross-examination that she had attempted to beat the prosecutrix, clearly indicating that as per the mother also, the act was done with the consent of the prosecutrix.

15. Even on the external region of the private parts, the prosecutrix has received no injuries indicating any violence. Even perception of

threat seems highly improbable, particularly, when Geeta was allowed to leave the place but she raised no alarm or sought no help from the members of her family nor did she make any attempt to inform prosecutrix's family about her being taken away forcibly. As noted, mother of the prosecutrix when she returned tried to beat her indicating that she also suspected prosecutrix to be a willing partner.

16. Question of age of the girl, however, survives. As per the School Leaving Certificate, she was below 15 years of age. It is true that there is discrepancy in the name recorded in the School Leaving Certificate and one by which the prosecutrix is usually known. It is equally true that without any further supporting evidence, it would be unsafe to rely on the date of birth recorded in the school records in the present case. However, the prosecution has sought to explain that prosecutrix “A” was also known as “S” and, hence, there is different name in the School Leaving Certificate. Regarding further corroboration to the age of the prosecutrix, one would find that Dr.Dilipkumar, P.W.4, assessed the age of the girl between 14 to 16 years. His assessment was based on the x-rays of the bone structure of the prosecutrix taken out for judging her age. In cross-examination though he agreed that the girl could be 16 years, refuted that considering number of teeth she could as well be 18. Additionally, I also find that the doctor found that the breast and nipples of the girl were under-developed. Her cubic hair were sparse. She had started menstruating only few months before. Considering all these aspects of the matter, I find that the prosecution succeeded in establishing that the girl was less than 16 years of age on the date of the incident. Her consent, therefore, remains irrelevant. The conviction of the appellant under Section 376 of the Indian Penal Code was, therefore, justified.

17. Last question of quantum of punishment, however, remains. Learned Assistant Judge has convicted the appellant and sentenced him to seven years of R.I. and payment of fine of Rs.250/-

18. It is true that Section 376 prescribes minimum punishment of seven years unless the Court for adequate and special reasons to be mentioned in the judgment decides to impose a sentence of lesser term.

19. In the present case, the appellant was a young boy. His exact age is not on record. However, from the medical evidence, it appears that he was barely 16 years of age when he committed the act of extreme indiscretion. He is not a habitual criminal. Had no past criminal record. Since the commission of offence, he is not stated to have been involved in any other offence. Though for the purpose of Section 376 of the Indian Penal Code considering the age of the girl, her consent was immaterial, this is not a case where the boy had forced himself on the prosecutrix.

20. The record suggests that the appellant has already undergone imprisonment for about two and a half years excluding remission.

21. Considering all these aspects of the matter, I find that this is a special case where sentence, less than a minimum prescribed under Section 376, should be awarded. To reiterate, boy was barely aged 16, when out of indiscretion, without fully understanding repercussions of his foolish act, he committed the said offence. The offence was committed way back in the year 1995. Therefore, it would be improper to remand the appellant back to police custody.

22. Under the circumstances, though conviction of the appellant under Section 376 of the Indian Penal Code is upheld, for the reasons recorded herein above, the sentence is reduced to that already undergone. With this direction, appeal is disposed of.

(Akil Kureshi, J.)

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